Internet Use and Getting 'Dooced': Regulating Employees' Online Speech

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Information technology is a double-edged sword for public employers. While it speeds and streamlines an employer's business operations, it also creates unparalleled vulnerabilities. Public agencies must guard against hackers, viruses, worms, and technical glitches that can disable or compromise entire networks. And, when employees log on to conduct business, there is the risk of decreased productivity as they manage personal affairs and communicate with friends. There is also the potential that online speech will give rise to libel and harassment claims, decreased morale, and a loss of public confidence in the agency as employees move their water-cooler gripes to a vast public forum.

One such forum is becoming increasingly popular: the blog. A blog is an interactive website on which users post information that visitors to the site may review and comment on — giving rise to a new verb, "to blog." There are more than 100 million blogs on the Internet, with a new one created every 5.8 seconds.[1] According to a recent survey, 5 percent of American employees blog and 9 percent post to blogs about their employer.[2] In fact, one estimate projects that more than 4.8 billion work hours will be spent annually by employees on blogs.[3]

Such numbers show that public employers cannot sit back and hope that their employees understand the fuzzy distinction between appropriate and inappropriate Internet use, much less that they are likely to comply with such murky standards. To the contrary, employers and employees alike benefit from clear notice and awareness of expectations. Indeed, the Public Employment Relations Board recently recognized that the implementation of an information technology policy was critical to the performance of a public entity's mission and, as such, implicated a fundamental managerial prerogative outside the scope of representation.[4]

In the private sector, employers may rely on the doctrine of at-will employment to justify the dismissal of employees based on their Internet activity, even if the

speech was generated offsite on private computers. In a survey of 294 large United States companies, 7.1 percent reported terminating an employee for blogging-related conduct.[5] In fact, the Internet community has spawned a new word for blog-based terminations: "dooced." This term originated from one of the first-reported blog-related terminations, that of Heather Armstrong. She was fired from her job as a web designer after she posted comments about her company and the office holiday party on her website — Dooce.com.[6]

Public employers, of course, are constrained by the free speech, privacy, due process, and access rights of employees and their exclusive bargaining representatives. In addition to analyzing whether an employee's online speech constitutes protected whistleblowing or union activity, public employers must determine whether it falls within the ambit of Title VII, the Fair Employment and Housing Act, the Labor Code, or other federal and state laws. Thus, the challenge for public employers is in understanding the contours of permissible versus impermissible online speech.

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Even though the technological advances and Internet terminology may be new, the jurisprudence relating to the intersection of a public employer's right to restrict employees' speech in order to promote the efficiency of its operations, and the right of public employees to speak freely, are long-standing. As discussed below, the U.S. Supreme Court's *Pickering-Connick* analysis establishes an initial threshold for determining how far a public employer may go in placing limits on its employees' online activity. The court's recent decision in *Garcetti v. Ceballos* carved out a significant exception for speech made in the course of one's official duties and further clarifies the scope of what constitutes protected speech under the *Pickering-Connick* analysis.[7]

PERB, too, distinguishes between matters of public concern, with respect to which employees have a constitutional right to speech, and matters of individual concern, such as an employee's private grievances, about which constitutional protection does not attach. PERB has explained that cases raising such issues require "careful consideration of the language, fundamental purposes and doctrinal foundations of [the applicable public sector labor relations statutes]; relevant public policy embodied in fundamental federal and state constitutional and labor law precedent; as well as exploration of the nature of the rights implicated…and the legal standards governing their waiver."[8]

The First Amendment: Balancing Employees' Speech With Employers' Efficient Operations

In a decision almost 40 years ago, the Supreme Court recognized the tension between an employee's right to speak and the public employer's legitimate right to perform its mission free of disruption. Confronting the court in *Pickering v. Board of Education* was whether a public school teacher could be lawfully terminated for writing a letter to the newspaper criticizing the local school board's handling of tax increases.[9] The court sought to "arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[10] In that case, the speech was protected by the First Amendment because the expenditure of funds at issue was a matter of public concern, while the school district was relatively unharmed by the speech.

Subsequently, in *Connick v. Myers*, the court held that whether an employee's speech is a matter of public concern may be determined by looking at the private character of the speech.[11] In that case, after an assistant district attorney was informed that she was going to be transferred against her wishes, she prepared a questionnaire soliciting the views of her colleagues concerning the transfer policy, office morale, the need for a grievance committee, confidence in

supervisors, and whether employees felt pressured to work in political campaigns. She then was terminated because of her refusal to accept the transfer, and she was told that her distribution of the questionnaire was an act of insubordination.

The Supreme Court found that the questionnaire was intended to gather ammunition for the employee's controversy with her superiors. The court noted that "[w]hile as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Thus, even when speech involves a matter of public concern, in certain forms or contexts the same subject spoken privately may not be considered as such.

The *Pickering* balancing test remains largely intact and has been clarified by decisions such as *Garcetti* relating to what is and is not a matter of public concern entitled to First Amendment protection. In *Garcetti*, the court held that an employee is not entitled to First Amendment protection where his speech is specifically related to the official duties he must perform as part of his job. The plaintiff in that case was a prosecutor who was required to evaluate and draft memos pertaining to the efficacy of search warrants. When the plaintiff concluded that an affidavit justifying a search warrant was inaccurate, he told his supervisors, who did not agree. The plaintiff then testified in favor of the defendant, which led to his dismissal. The court held that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[12]

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In summary, an employee is protected from adverse employment action if he or she speaks on a matter of "public concern."[13] A matter of public concern is "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[14] In addition, courts look at the content, form, and context of the speech in determining whether it is a matter of public concern. While speech on matters of public concern is generally protected, the balancing test is applied to determine whether the speech has interfered with the employer's efficient delivery of public services.[15]

Additional Considerations Regarding Off-Duty Conduct

Pickering, *Connick*, and their progeny generally involved situations in which public employees commented about governmental policies based on their knowledge and perspective as public employees. The holdings in those cases were buttressed by the employee's rights to speak freely about such matters and the public's right to know such information.

The analysis becomes more complicated when public employees' speech takes place outside of work, on their own time, and on their own computers. Employees have an expectation of privacy in off-duty hours.[16] Under those circumstances, it is more difficult for the public employer to demonstrate a substantial detriment warranting censorship of the speech. In such cases, the court appears to give greater deference to the employee's speech, holding that such speech has First Amendment protection absent some governmental justification in regulating it that is "far stronger than mere speculation."[17]

In addition, when public employee speech takes place off-site and off-duty, constitutional privacy considerations limit a public employer's ability to discipline the employee for such speech. California citizens enjoy broad privacy interests protected by Section 1, Article 1, of the state Constitution. The right to privacy "protects our homes, our families, our thoughts, our emotions, our expressions, our

personalities, our freedom of communion, and our freedom to associate with the people we choose…."[18] Constitutional privacy rights come into play when employees have a "reasonable expectation of privacy" in their conduct.[19]

In addition, Secs. 96(k) and 98.6 of the California Labor Code prohibit employers from discriminating against employees for lawful conduct occurring during nonworking hours away from the employer's premises.[20] However, these protections apply only to off-duty lawful conduct that is otherwise protected by the Labor Code or a recognized constitutional right.[21]

A state or local agency employee may be disciplined for engaging in activities that are "inconsistent, incompatible, in conflict with or inimical to his or her duties…."[22]

An additional exception exists for police officers, who can be disciplined for engaging in lawful activities during off-duty hours if such activities are inconsistent with their duties as peace officers and tend "to impair the public's trust in its police department."[23]

Thus, public employers still may restrict both on-duty and off-duty speech or conduct that creates an impairment or disruption of the employer's mission or operations.

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The principles involving off-duty conduct and the Internet were recently applied by the Supreme Court in *City of San Diego, California v. Roe*.[24] At issue in that case was whether the San Diego Police Department violated the employee's First Amendment rights by dismissing him for his off-duty, non-work-related activities. Specifically, the city terminated the police officer after discovering that he made a video of himself performing sex acts while stripping off his police uniform. He then sold the video on the adults-only section of eBay, the popular online auction site. The officer's supervisor found out about the video when he discovered an official San Diego Police Department police uniform for sale on the website. Further investigation revealed other items and the sex video, all for sale using the police officer's online codename.

The court held that the police officer's conduct "does not qualify as a matter of public concern under any view of the public concern test." As a result, the *Pickering* balancing test was not even applicable because the officer's conduct did not constitute protected speech. In addition, the court noted that unlike speech that is wholly unrelated to public employment, the conduct in this case was deliberately linked to the police officer's employment in a way that compromised substantial interests of the police department. Thus, the court held that not only was the employee's conduct not protected by the First Amendment, but also the termination was appropriate because the speech "was detrimental to the mission and functions of the employer."[25]

Thus, like the word "blog," the term "dooce" may well make it into the mainstream dialogue of public employees and employers. The foregoing examples demonstrate that blogging and other online speech and activities by public employees raise the possibility of workplace disruption, even if the speech is undertaken outside the workplace, on private computers, and on private networks. The Internet increases the potential for off-duty conduct to create workplace disruption, including breaches of security, decreased productivity and morale, and risks to the employer's computer network. In addition, online speech by public employees raises the possibility of employer exposure to liability due to harassing, hate, defamatory speech, or publication of copyright-protected materials. As a result, certain well-defined limitations are appropriate and will likely withstand constitutional challenge.

Other Legal Constraints

The constitutional speech test is not the end of the analysis in considering whether to regulate or discipline Internet-related speech. In the absence of an explicit policy

and acknowledgment by employees that the employer may monitor the use of computer files at any time, public employees may contend that the Fourth Amendment requires "reasonable suspicion" before the employer may inspect individual, private emails.[26] It is critically important that an employer negate any expectation of privacy by employees regarding their computer files.[27]

Various statutory protections may also apply to employees' online speech. For example, speech that constitutes whistleblowing enjoys statutory protection in California — a public employee is protected from adverse employment action if the employee discloses information to a public agency or law enforcement about law-breaking or noncompliance with federal or state law. The public employee must have "reasonable cause" to believe the reported conduct is illegal.[28]

Similarly, employers cannot discriminate against employees who file complaints or participate in proceedings relating to the occupational safety and health conditions at the workplace.[29] However, even though the authors of online blogs may complain about various aspects of the workplace, they tend to be passive and indirect in their disclosures. As such, blog content rarely constitutes sufficient disclosure to a public agency or law enforcement, or participation in an OSHA proceeding, to warrant application of these statutes.

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State and federal law also prohibits employment discrimination on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person.[30] For example, where an employee's personal website reflects the employee's sincerely held religious beliefs or the individual's marital status or sexual orientation, the employer must exercise caution in ensuring that its policies are applied neutrally and are tailored to the disruptive impact to the workplace rather than based on biases relating to the protected content.

Public Sector Union Access Rights

Whether on or off the job, employees' communications regarding union-related matters, such as working conditions, grievances, negotiations, and job actions, may constitute "matters of public concern" for purposes of constitutional speech rights.[31] In the absence of a showing that the speech is disruptive to the public agency's operations, a public employee may not be disciplined for speech on matters of public concern.[32]

The precise extent to which public employers can control union-related communications presents unsettled issues of law. On November 29, 2007, the California Supreme Court granted the California Teachers Association's petition for review in *San Leandro Teachers Assn. v. Governing Board of the San Leandro Unified School Dist.*[33] In that case, the First District Court of Appeal held that the school district was not required to allow its teachers unions to distribute a newsletter containing political endorsements via the district's internal mail system.

The *San Leandro* court upheld the school district's mailbox policy, which parallels Education Code Sec. 7054 ("No school district…funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate…."), on the grounds that the mailbox system was a nonpublic forum, and that the restriction on the union's access to school district mailboxes for purposes of political advocacy was reasonable and viewpoint-neutral. Although the union's writ petition was premised on Article I, Section 2, of the California Constitution, which provides broader speech protections than the First Amendment of the federal Constitution, the court applied a federal forum analysis based on a line of published California decisions involving freedom of expression in the educational context.

In addition to the constitutional issues, the court examined the district's policy in light of the access provisions

of the Educational Employment Relations Act. That statute, like certain other California public sector labor laws,[34] grants an exclusive bargaining representative "the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, *subject to reasonable regulation*…."[35]

Under EERA, the *San Leandro* court found that the school district's policy was a "reasonable regulation" because it served the valid public purpose of limiting the district's involvement in political activity. This finding is consistent with decisions issued by the Public Employment Relations Board, which will uphold employer regulations limiting union access that are "properly related to justifiable concerns about disruption…[and] narrowly drawn to avoid overbroad and unnecessary interference with the exercise of statutory rights."[36]

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PERB has held that the decision to implement a computer use policy is within the exercise of managerial prerogative.[37] However, the employer is not necessarily relieved of the duty to negotiate the effects of the decision on bargaining unit members if it impacts matters within the scope of representation. The subject matter of a computer use policy may be subject to negotiations if the policy changes the status quo, establishes new grounds for discipline, or relates to the union's use of email to communicate with employees.[38]

Moreover, an employer may not discriminatorily limit employees' use of email for union purposes. Once an employer has opened a forum for non-business communications, employees must be permitted to use that forum for a similar level of union-related communications.[39] A policy that restricts a union's access rights creates a corresponding interference with employees' representation rights.[40] Even under the statutory access provisions of EERA and the Higher Education Employer-Employee Relations Act, an employer is not obligated to open to the unions "every and all other means of communication."[41]

Conclusion

As technological innovations continue, it is clear that the Internet, "blogging," and getting "dooced" are here to stay. This rapidly developing area of the law not only implicates competing legal interests but also involves overarching considerations of employee morale, workplace productivity, government security, public sentiment, and broad societal communications.

Many employment disputes, and many blog complaints regarding employment, arise from a lack of clearly articulated policies and clear notice of the employer's expectations. Employers may be able to forestall public complaints by establishing internal procedures that are receptive to employee criticism.

In light of the interests at stake, public employers must implement computer use policies that recognize public employees' constitutional and statutory rights but diligently protect the employer's right to maintain a safe, efficient workplace consistent with the employer's mission. Careful negotiation of union access provisions in a collective bargaining agreement is an important first step.

In the public employment workplace, Internet and electronic communications policy should include, at a minimum, the following:

- a disclaimer on Internet postings and personal emails reflecting that the user is expressing his or her own viewpoint, not the employer's;
- a prohibition against disclosure of confidential information or information that could breach the security of the employer's computer system in any way;
- an acknowledgment by the employee that the employer may monitor the use of his or her computer files at any time;

- an acknowledgment by employees that personal Internet use will be kept to a minimum and blogging will be done on the employee's own time and own computer;
- a prohibition against posting any material that would constitute harassment, hate speech, or libel;
- a prohibition against conducting outside business;
- a prohibition against sending or accessing sexually explicit material;
- an acknowledgment that the employer may require immediate removal of, and impose discipline for, material that is disruptive to the workplace or impairs the mission of the employer.

Employers should periodically send memoranda to employees reminding them of the restrictions on the use of agency equipment. These guidelines are intended only as a starting point for an employer's comprehensive computer use policy. ❋

1 McCann, Rob, *The Blogosphere by The Numbers*, ClickZ Network, Nov. 22, 2004, http://www.clickz.com/showPage.html?page=342889lBlogcount.com.

2 See Employment Law Alliance, "Blogging and the American Workplace," (2006) http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf.; Edelman and Intelliseek, "Talking From the Inside Out: The Rise of Employee Bloggers," 6 (2005), http://edelman.com/image/insights/content/Edelman-Intelliseek%20Employee%C20Blogging%C20White%20Paper.pdf.

3 Wilson, Trish, *Employees Wasting Time Reading Blogs At Work — Your Boss Is Onto You*, Blogcritics Mag., Oct. 25, 2005, http://blogcritics.org/archives/2005/10/24/150852.php.

4 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 188 CPER 103.

5 Statistics on Fired Bloggers, http://morphemetales.blogspot.com/2006/10/statistics-on-fired-bloggers.html Oct. 8, 2006, 18:35.

6 Stephen D. Lichtenstein & Jonathon J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooced?* UCLA Journal of Law & Technology, Fall (2006).

7 *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951, 180 CPER 13 (when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline).

8 *San Marcos Unified School Dist.* (2003) PERB Dec. 1508, 158 CPER 83.

9 *Pickering v. Board of Education of Township High School Dist. 205* (1968) 391 U.S. 563, 568.

10 *Ibid.*

11 *Connick v. Myers* (1983) 461 U.S. 138, 147-48, CPER SRS 22.

12 Under *Garcetti*, *supra*, employers are well advised to create broad job descriptions that encompass all of an employee's duties.

13 *Pickering v. Board of Education*, *supra*, 391 U.S. at 574.

14 *City of San Diego, California v. Roe* (2004) 543 U.S. 77, 83, 125 S.Ct. 521.

15 Thus, in *Brewster v. Board of Education* (9th Cir. 1998) 149 F.3d 971, 131 CPER 46, the Ninth Circuit found that the district was justified in terminating a teacher based on the disruption of his relationship with his principal. The district's interest in maintaining positive working conditions between teachers and their principals — i.e., a close working relationship with frequent contact [that] requires trust and respect in order to be successful" — outweighed the teacher's First Amendment rights.

16 *Edgerton v. State Personnel Board* (2000) 83 Cal.App.4th at 1361, citing *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096 (the intrusion on employees' privacy rights by random drug testing was significantly enhanced because employees were subject to follow-up drug testing on off-duty time).

17 *United States v. Treasury Employees* (1995) 513 U.S. 454, 465, 475, 115 S.Ct. 1003.

18 *Edgerton v. State Personnel Board*, *supra*, 83 Cal.App.4th at 1361, citing *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1096.

19 *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 106 CPER 61.

20 Labor Code Secs. 96(k); 98.6 (West 2000). Similarly, Gov. Code Sec. 19572 provides that in order to impose discipline for state employees' off-duty conduct, the conduct must be rationally related to the employment and must be of the nature that would result in impairment or disruption of public service.

21 *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72; *Barbee v. Household Auto. Finance Corp.* (Ct. App. 2003) 6 Cal.Rptr.3d 406, 412.

22 Gov. Code Sec. 19990; Gov. Code Sec. 1126.

23 *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 568, 587, 87 CPER 31.

24 *City of San Diego v. Roe*, *supra*, 543 U.S. 77; see also *Dible v. City of Chandler* (2007) 502 F.3d 1040, (police officer's sexually explicit website featuring himself and his wife was not an expression of speech on "matter of public concern" because the website did not give the public any information about the operations, mission, or function of the police department).

25 *City of San Diego v. Roe*, *supra*, 543 U.S. at 80 (per curiam).

26 USCA Const. Amend. IV.

27 *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443 (an insurance company defending a wrongful discharge claim may inspect a plaintiff's home and office computers, which had been supplied by the employer with an explicit policy against private use, thereby negating any expectation of privacy by the plaintiff); see also, *Biby v. Board of Regents, of University of Nebraska* (8th Cir. 2005) 419 F.3d 845 (a warrantless search of an employee's computer for work-related material did not violate a clearly established constitutional right since the employer's policy permitted such searches). A full discussion of federal and state law governing electronic surveillance is beyond the scope of this article.

28 Lab. Code Sec. 1102.5 (West Supp. 2006).

29 Lab. Code Sec. 6399.7 (West Supp. 2006).

30 Gov. Code Sec. 12940 (West 2000).

31 *Chico Police Officers Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 646, 90 CPER 31 (speech concerning employer-employee relationships, officer safety, and loss of confidence in the management of the department are matters of public concern).

32 *Kirchmann v. Lake Elsinore School Dist.* (1997) 57 Cal.App.4th 595, 609, 126 CPER 29, modified on other grounds and rehearing den. (2000) 83 Cal.App.4th 1098; *Waters v. Churchill* (1994) 511 U.S. 661, 675, 107 CPER 16.

33 (2007) 154 Cal.App.4th 866, 186 CPER 28.

34 EERA and HEERA expressly establish a right of access to facilities and various means of communications. (Secs. 3543.1[b], 3568.) Although the Dills Act (Secs. 3512 et seq.) does not contain an express right of access, PERB has found an implied right of access. *State of California (Dept. of Transportation)* (1980) PERB Dec. No. 127-S, 46 CPER 74. The statutory language PERB relied on to find an implied right of access in the Dills Act is also present in the Trial Court Employment Protection and Governance Act.

35 Gov. Code Sec. 3543.1(b). (Emphasis added.)

36 *Regents of the University of California v. Public Employment Relations Bd.* (1988) 485 U.S. 589 (128 LRRM 2009), 77 CPER 3 (postal statutes bar use of an employer's internal mail system).

37 *Trustees of the California State University* (2007) PERB Dec. No. 1926-H, 188 CPER 103; but see *State of California (Water Resources Control Board)* (1999) PERB Dec. No. 1337-S, 138 CPER 66 (employer violated the Dills Act when it unilaterally implemented a new Internet/intranet usage policy without providing union with notice or an opportunity to bargain over that change).

38 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 158 CPER 85.

39 *Sierra Sands Unified School Dist.* (1993) PERB Dec. No. 977, 99 CPER 44.

40 *Trustees of the California State University* (2003) PERB Dec. No. 1507-H, 158 CPER 85. At the same time, however, at least one PERB decision holds that the unions' right of access to employees does not apply to every possible means of such access. If the employer offers evidence of disruption, the availability of alternative means of communication will be considered. *Regents of the University of California* (1984) PERB Dec. No. 420-H.

41 *Regents of the University of California v. Public Employment Relations Board* (1986) 177 Cal.App.3d 648, 68X CPER 5.